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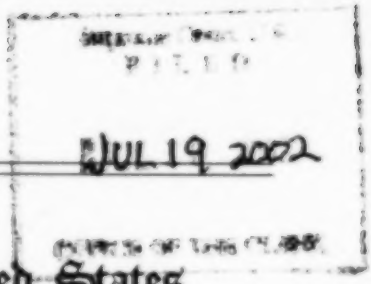

No. 01-1231

In The
Supreme Court Of The United States
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS WITH APPENDIX

QUESTION PRESENTED

This Court granted the petitioners' petition for a writ of certiorari on the following issue:

> Did the Court of Appeals erroneously conclude, contrary to other courts of appeals and in a manner inconsistent with the Court's ruling in *Paul v. Davis*, that Connecticut's Sex Offender Registration Law implicates an offender's liberty interest by listing offenders in an undifferentiated Registry, and violates due process by failing to afford the offender a hearing regarding his 'current

dangerousness' before publishing true and accurate information about him and his conviction history?

LIST OF PARTIES

In both the District and the Court of Appeals the plaintiffs are listed as Samuel Poe and John Doe.

In both courts below, the defendants were the Department of Public Safety on behalf of Henry C. Lee, Commissioner, the Office of Adult Probation on behalf of Robert Bosco, Director, and John Armstrong, Commissioner of the Department of Correction.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on October 19, 2001, is reported at *Doe v. Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001), and is printed in the Joint Appendix ("JA") at JA 232-277. The memorandum of decision of the United States District Court for the District of Connecticut, Chatigny, *J.*, dated March 31, 2001, is reported at 132 F. Supp.2d 57 (D. Conn. 2001), and is printed in the Joint Appendix to this petition at JA 134-162.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes at issue appear in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 19, 2001. The petitioners filed their petition for certiorari on February 19, 2002, which this Court

granted on May 20, 2002. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts

The respondent,[1/] John Doe, was convicted in Connecticut of a crime designated by Connecticut law as a "sexually violent offense," and released from his sentence sometime between 1988 and 1998. JA 116. He brought suit pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Connecticut's Sex Offender Registration Law ("SORL"), alleging violations of both the Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Clause of the United States Constitution. JA 112-132. Specifically, and notwithstanding an explicit disclaimer to the contrary, the respondent alleged, with regard to his due process claim, that the SORL publicly "stigmatized" and defamed him by falsely proclaiming him as a "dangerous" sex offender. JA 113. This defamation, he claimed, combined with Connecticut's sex offender registration requirements, constituted a violation of his right to procedural due process. *Id.*

A. Federal Law

Like many other states, Connecticut's legislature enacted its SORL in part to continue to qualify Connecticut for federal funds pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("Wetterling Act"), 42 U.S.C. § 14071 (1994 & Supp. V. 1999).[2/] The Wetterling Act conditions the availability of certain federal funding

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1/ The caption of this case has at all three levels listed two pseudonyms as plaintiffs, but John Doe was and remains the sole named plaintiff and respondent-appellee.

2/ *See* Conn. Judiciary Committee pt. 4, p. 1069 (March 9, 1998) (remarks of T. Siconolfi, Director of Justice Planning for the Office of Policy & Management, testifying on behalf of Governor Rowland).

on a state's substantial compliance with the Act's standards for state sex offender registration and public information laws.[3/] 42 U.S.C. § 3756; 42 U.S.C. § 14071(e)(2) (Supp. V 1999). The Wetterling Act specifically modified previously existing federal law to require that a participating State not only collect registration information, but "release relevant information that is necessary to protect the public concerning a specific person required to register." 42 U.S.C. § 14071(e)(2).

Federal guidelines developed by the United States Attorney General pursuant to the Act's requirements provide that participating states "*must* establish a conforming information release program that applies to offenders required to register on the basis of convictions occurring after the establishment" of the federal registration laws. 64 Fed. Reg. 572 (1999) (emphasis added). The "principal objective of the information release programs will include means for members of the public to obtain information concerning registered offenders." 64 Fed. Reg. 572, 581 (1999).[4/]

Although federal law requires that states make Registry information available to the public, it leaves it to the states to determine how to do so. *Id.* Specifically, the federal guidelines contemplate two systems of information disclosure. A system like Connecticut's, in which conviction history is both the sole criteria

3/ The Department of Justice Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, provide: "[T]he Act's standards constitute a floor for state programs, not a ceiling. States do not have to go beyond the Act's minimum requirements to maintain eligibility for full Byrne Grant funding, but they retain the discretion to do so, and state programs do often contain elements that are not required under the Act's standards." 64 Fed. Reg. 572, 575 (1999).

4/ "[I]nformation collected under a state registration program may be disclosed for any purpose permitted under the laws of the state. Therefore, there is no requirements [sic] under the Act that registration information be treated as private or confidential to any greater extent than the state may wish." 64 Fed. Reg. 572, 581 (1999).

for inclusion in the Connecticut Sex Offender Registry ("Registry") and the primary information released from the Registry, is referred to as an "information on request" system. *Id.* The other system the federal guidelines contemplate involves a "risk assessment" process, providing registrants with a hearing at which state officials attempt to determine, in two or more categories, the level of risk a given individual poses to the community. *Id.* This assessment results in a tiered system whereby the level of public notification is determined by the sex offender's risk classification. *Id.*[5/]

B. Connecticut Law

Connecticut's current SORL, enacted in 1998 and amended in 1999, Conn. Gen. Stat. §§ 54-250 to 54-261; 54-102g, requires Connecticut's Department of Public Safety ("DPS") to maintain a central registry of persons residing in Connecticut who have been convicted of enumerated criminal offenses designated as "sexually violent offenses" and released into the community since 1988.[6/] Conn. Gen. Stat. §§ 54-250 to 54-252. Persons released after the effective date of the original act, October 1, 1998, who were convicted of enumerated offenses designated as "criminal offenses against a minor" must also register. Conn. Gen. Stat. § 54-251.[7/]

5/ Most recently, in 2000, Congress enacted the Campus Sex Crimes Prevention Act (CSCPS), Pub. L. No. 106-386, § 1601, 114 Stat. 1537, amending the Wetterling Act, 42 U.S.C. § 14071(j) and 20 U.S.C. § 1092(f)(1) (1994 & Supp. V. 1999). This Act, effective in October 2002, requires States participating in the Wetterling program to make available conviction information regarding all registered sex offenders either enrolled in or employed by an institution of higher education, without regard to the presence or result of any individualized risk assessment.

6/ Connecticut also requires the registration of persons found not guilty of enumerated offenses by reason of mental disease or defect. Conn. Gen. Stat. §§ 54-251(a); 54-252(a); 54-253(a), 54-254(a); 54-255(a), 54-256. The registration statutes treat convictions of enumerated sex offenses and such findings of not guilty identically, and therefore both are collectively referred to throughout this brief as "convictions".

7/ In 1999, Connecticut amended its new law to include a broader list of

Registrants are required to provide to the DPS their addresses, fingerprints, picture, and a blood sample, and are required to update their address periodically and their picture at least every five years. Conn. Gen. Stat. §§ 54-250 to 54-252; 54-102g. Registration requirements continue for ten years for all registrants except those convicted of offenses Connecticut law designates as "sexually violent offenses," who are required to maintain their registration for life. Conn. Gen. Stat. § 54-252(a).[8/]

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sex offenses resulting in registration. Conn. Gen. Stat. §§ 54-251(b), (c). This broader list of offenses includes Fourth Degree Sexual Assault. Connecticut also amended its law to provide a mechanism whereby limited categories of registrants could seek an exemption from the public dissemination of their Registry information, while maintaining their registration status. Fourth Degree sex offenders may also seek to be excused from the registration requirements, as may those second degree sex offenders whose victims were between the ages of 13 and 16, if the offender was no more than two years older than such person at the time of the offense. Conn. Gen. Stat. § 54-251(b). In addition, offenders in cohabiting relationships with victims whose identities might be revealed, and one-time offenders who did not serve a prison sentence may apply to have their information restricted to law enforcement use only. Conn. Gen. Stat. §§ 54-255(a), (b), (c).

8/ The Wetterling Act requires that states participating either designate certain convicted sex offenders as "sexually violent predators" or establish compliance with this portion of the Act through alternative measures. 42 U.S.C. § 14071(a)(2)(C). Although participating in and certified as in compliance with the Wetterling program, Connecticut does not designate any persons as "sexually violent predators," consistently avoiding any label other than the accurate term "convicted sex offender." The Wetterling Act allows "alternative measures of comparable or greater effectiveness in protecting the public" to constitute a waiver of the requirements related to sexually violent predators. 64 Fed. Reg. at 574. In addition to requiring that a state designate some persons as "sexually violent predators," the Act requires that those persons so designated report to the State any mental health treatment they have received. As Connecticut does not designate any persons as sexually violent predators, it requires those persons convicted of felonies designated as sexually violent offenses provide treatment information. Conn. Gen. Stat. § 54-252(a).

Those registrants failing to comply with registration requirements are subjected to arrest and prosecution for a Class D felony. Conn. Gen. Stat. §§ 54-252, 54-253, 54-254, 54-255. Each of the preceding requirements is mandated by or consistent with Connecticut's participation in the Wetterling program. 42 U.S.C. §§ 14071(a), 14071(b); 64 Fed. Reg. 572, *et seq*.

As of May 15, 2001, the Registry contained information regarding 2,075 individuals, with 1641 of those registrants in compliance with the law. JA 15. Naturally, the number of convicted offenders on the Registry continues to grow as more offenders are convicted of covered offenses, released from prison, or move into Connecticut.

Connecticut law requires that DPS make Registry information available to the public in two ways. First, DPS must post on an Internet website each registrant's photograph, conviction history, address and identifying marks or features. Conn. Gen. Stat. § 54-258. Prior to being enjoined, the website allowed visitors to access individual offender screens by conducting targeted searches: i.e., offender name or partial name, town or zip code.[9/] In addition, the SORL requires Connecticut law enforcement agencies to maintain Registry information about sex offenders residing in their jurisdictions, and to share that information upon request with members of the public. Connecticut's statute also specifically requires that a warning regarding criminal prosecution for misuse of registry information be provided any time Registry information is accessed, either on the Internet or by State or local police. Conn. Gen. Stat. § 54-258a.

9/ The Court of Appeals misunderstood the District Court record in noting: "During its first five months of operation, the website was visited more than three million times." *Doe v. Public Safety*, 271 F.3d at 44 n.14. The parties stipulated that *individual* sex offender listings on the website had been accessed approximately 3 million times (as that was the method of record keeping maintained by DPS). JA 16. A single visitor to the website could access the sites of any number of registrants at a time, or repeatedly, meaning that the actual number of visitors was significantly fewer than the figure reported by the Court of Appeals.

Visitors to the Sex Offender website would find the following language prominently displayed on the initial screen:

> **This information is made available for the purpose of complying with Conn. Gen. Stat. § 54-250 *et seq* . . . The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. *The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous.* Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.**

271 F.3d at 44-45 (emphasis added).

II. Proceedings Below

The District Court granted summary judgment for the respondent on his procedural due process claim, declaring SORL violated of the respondent's procedural due process rights. *Doe v. Lee*, 132 F. Supp.2d at 66 (D. Conn. 2001). The District Court then certified this matter as a class action with all Connecticut registrants as members of the class and enjoined all public access to Connecticut's Registry, on May 17, 2001. JA 186-87. The District Court granted summary judgment for the petitioners on the respondent's Ex Post Facto claim. *Doe v. Lee*, 132 F. Supp.2d at 70.

The basis of the District Court's due process holding was the "undifferentiated" nature of Connecticut's Registry. Specifically, the Court reasoned that the fact that all sex offenders were included together and identified as registrants, coupled with the availability of the Registry to the public, falsely implied that all persons contained in the Registry are dangerous and likely to re-offend. *Id.* at 63-65. The District Court decided that the explicit disclaimer to the contrary could not sufficiently overcome what it considered an implicit suggestion of dangerousness, stating: "Despite the accuracy of the registry data concerning the plaintiff and the statement on the website that no determination of any individual's dangerousness has been made, the registry *suggests* that the plaintiff is currently dangerous." *Id.* at 63. (emphasis added). On this basis, the District Court determined that the public availability of accurate data in Connecticut's Registry conveyed a false message, and therefore that the State of Connecticut had "stigmatized" or defamed the respondent as well as other "nondangerous registrants." *Id.* at 64.

The District Court applied a "stigma plus" test derived from this Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), which requires a claim of constitutional defamation to include an additional element -- the loss or deprivation of a "right or status previously held under state law." *Id.* at 708; *see Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994). Having found the stigma portion satisfied, the District Court then held that the "plus" portion of the "stigma plus" test was satisfied because the respondent must register his identifying information and update his address or risk criminal prosecution. *Id.* at 64-66. The District Court reasoned that these registration requirements deprive the respondent of a previously existing legal status unencumbered by registration requirements, when taken together with the "stigmatizing" conduct of publishing accurate Registry information implicate a liberty interest. *Id.* at 66. Because Connecticut does not provide any hearing prior to release of Registry information on the question of a registrant's dangerousness, the District Court held that the release of this information violated the respondent's procedural due process rights. *Id.* The Court noted that the cure for this constitutional

infirmity would be for Connecticut to implement a tiered system: "In a tiered system, a recipient of a registrant's information can discern the dangerousness of that registrant relative to the universe of sex offenders." *Id.* at 64.[10/]

Having found what it considered a constitutional violation, the District Court enjoined any public access to the undifferentiated Registry information if such disclosure would identify the information as coming from the Registry. In particular, the Court enjoined the defendants from the following:

> 1) disclosure or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and
>
> 2) identifying any member of the due process class as being included in the Registry.

JA 188. Under the District Court's injunction, the public can neither access the Internet website, nor obtain Registry information from a local law enforcement agency. The District Court did not enjoin the registration requirements, however, and therefore convicted sex offenders must continue to register and provide identifying information.

The Court of Appeals upheld the District Court's injunction and its determination that Connecticut's SORL violates the respondent's procedural due process rights. Noting that "stigma and defamation are virtually synonymous," *Doe v. Public Safety*, 271 F.3d at 48 n.16, the Court of Appeals concluded that Connecticut's Registry stigmatized and defamed the respondent notwithstanding its concession that nothing factually erroneous appeared in the Registry. In fact the Court noted that Connecticut's "assertions" that persons included on the Registry had been convicted of offenses designated by the state as sex offenses "are

10/ *See also Doe v. Lee*, 132 F. Supp.2d at 64. ("Because there is no classification system, the viewer has neither absolute nor relative information regarding the dangerousness of the registrant.").

concededly true." *Id.* at 47. The Court of Appeals went further to state: "We share some of the State's doubt as to whether, as a matter of law, public dissemination of the Registry implies to any particular reader, its average reader, or to 'an appreciable fraction' of its readership, that every listed person . . . is currently dangerous." *Doe v. Public Safety*, 271 F.3d at 49, citing *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (defamation action).

Conceding the "highly paternalistic" nature of any court order "the purpose of which was to require [a State] to keep truths from its citizens," *Id.* at 50, *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770 (1976), the Court of Appeals nonetheless accepted the District Court's determination that the "message that *some* registrants are currently dangerous is, and is intended to be, communicated to viewers of the Registry." *Doe v. Public Safety*, 271 F.3d at 49, *citing Doe v. Lee*, 132 F. Supp.2d at 64 (emphasis in original). From this premise, the Court of Appeals leapt to the conclusion that *all* registrants included on the Registry were defamed by the Registry's implication of dangerousness, and that the first prong of the stigma test was satisfied.

As for the "plus" prong, the Court of Appeals stated: "[W]e hold that a plaintiff establishes a 'plus' factor for purposes of the *Paul v. Davis* 'stigma plus' test only if he or she points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." *Id.* at 56. The Court of Appeals minimized the substance of the "plus" requirement, stating:

> The [Supreme] Court did *not* suggest that the requisite tangible interest or burden *needs to meet some threshold of substantiality* or that it must implicate a certain kind of interest, but rather that it must at least entail some *non-trivial* state involvement that removes the plaintiff's complaint from the realm of traditional state-law defamation.

Id. at 54-55 (emphasis added).

Thus, the Court of Appeals derived from *Paul v. Davis* a new, diminished standard for the existence of a plus: that the governmental action or involvement complained of be something unique to a governmental actor, or "quintessentially 'governmental in nature.'" *Id.* at 57. As only a governmental entity can compel registration, the Court of Appeals concluded that the registration requirements of Connecticut's law constituted a sufficient "plus" that, when combined with the implicit defamation, creating a liberty interest. *Id.*

SUMMARY OF THE ARGUMENT

> Sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sex assaults occurred nationwide. Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime. . . . [T]he victims of sex assaults are most often juveniles. In 1995, for instance, a majority of reported forcible sex offenses were committed against persons under 18 years of age. Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.

McKune v. Lile, 536 U.S. __, 122 S.Ct. 2017, 2002 U.S. LEXIS 4206 at *18 (2002) (citations, quotations omitted).

In response to the special problems posed by sex offenders, the federal government and all 50 states have enacted a variety of laws designed to promote an increased awareness of their presence in our communities. Department of Justice, Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) at 1 ("CSOM, *Registration*"). A critical part of such legislation has been the enactment of Sex Offender Registration Laws, or "Megan's Laws," referring to Megan Kanka, a 7-year old raped and murdered by her neighbor. Neighborhood residents were unaware that Megan's killer had been twice convicted of sex offenses. *E.B. v. Verniero*, 119 F.3d 1077, 1097 n.17 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109, 1110 (1998).

Connecticut's SORL requires the State's DPS to collect and maintain objective, truthful information about persons convicted of sex offenses, including their identity, statutory offenses, picture and address, and to make that information available to the public on request, both via the Internet and at local law enforcement sites. The DPS complied with this law and compiled the Sex Offender Registry. The Court of Appeals held that making this information available to the public is constitutionally impermissible under the Due Process Clause of the Fourteenth Amendment.

This Court has made clear that no liberty interest exists sufficient to implicate due process in an action alleging defamation by a government defendant absent both a defamatory statement and concomitant loss of a tangible right or status previously recognized by state law. Neither a defamatory statement nor the loss of a tangible right exists in the facts of this case. The decision of the Court of Appeals prohibits the State from communicating to its citizens truthful and important information about sex offenders. This unwarranted interference with the State's ability to disseminate this information is wholly at odds with basic constitutional principles that protect and promote the open flow and exchange of truthful communication. Moreover, this attack on the State's right to inform the public is premised on the misapplication of novel theories of implied defamatory statements and expansively strained notions of what constitutes an impairment of a right or status under state law.

Indeed, the flaws in the Court of Appeals' analysis are many. First, the petitioners have not defamed or falsely stigmatized convicted sex offenders by making the State's Registry accessible to the public. The information conveyed is accurate and true, and any impression of "dangerousness" is more than adequately disclaimed. Even conceding for the sake of argument the Court of Appeals' conclusion that an implication or suggestion is communicated that *some* members of the group of convicted sex

offenders may be dangerous, no defamation exists. As no specific subject of the alleged statement regarding dangerousness is identified, the respondent's claims of defamation must fail. This Court should reject the respondent's due process claim, lest public officials be subjected to constitutional liability for behavior that under tort law private entities would not be liable.

Not only does the respondent's claim of defamation fail, but the additional element necessary to a liberty interest, referred to by the lower courts as the "plus," cannot be satisfied by the requirement that convicted sex offenders register their name and other identifying factors with the State. The registration requirements do not materially alter a status or right previously recognized by state law.

Furthermore, *Paul v. Davis* requires that the additional or "plus" element be causally related to the stigmatizing statement. This causal relationship is entirely lacking here as the registration requirements exist independently of the purported defamatory statement. In fact, those requirements continue in place even under the injunction prohibiting the dissemination of the Registry information. The Court of Appeals' decision accepting the registration requirements as satisfying the "plus" element effectively eviscerates the limits on constitutional torts imposed by this Court in *Paul v. Davis* and this Court should therefore reverse.

ARGUMENT

With regard to civil rights actions premised upon alleged governmental defamation, this Court has held that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul,* 424 U.S. at 701. "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Under *Paul v. Davis*, which both the respondent and the lower courts relied upon, a plaintiff must establish two things to make out a procedural due process claim based upon defamation. First, the plaintiff must establish that a governmental actor has subjected him to behavior

tantamount to the common-law tort of defamation. *Siegert,* 500 U.S. 226, 233 (1991); *Paul*, 424 U.S. at 697-712; *Roth*, 408 U.S at 573; *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Second, the plaintiff must demonstrate "that the governmental action taken in [the course of the defamation] deprived the individual of a right previously held under state law." *Paul*, 424 U.S. at 708. Lower courts, including the Court of Appeals in this case, have typically referred to this two-pronged analysis as the "stigma plus" or "defamation plus" test.[11/] *See id.* at 709 (referring to the stigma resulting from the defamatory character of the communication).

In this case, as in *Paul*, no liberty interest is implicated because the respondent cannot sufficiently establish either the first or second prong of the "stigma plus" test. Connecticut's SORL neither defames the respondent nor does it deprive him of a previously existing right or status.

I. Publication Of Truthful Information About Those Included In The Connecticut Sex Offender Registry Is Not Stigmatizing.

More than "mere defamation" is necessary to implicate a liberty interest. *Paul,* 424 U.S. at 706. *A fortiori*, a claim that does not suffice even to state a cause of action for defamation renders unnecessary further consideration of whether a liberty interest is implicated. For example, in *Board of Regents v. Roth*, this Court concluded that in the absence of a defamatory statement, no process was due a plaintiff who had not been rehired by a state defendant. *Roth*, 408 U.S. at 573. The Court stated:

11/ *See, e.g., Doe v. Public Safety,* 271 F.3d at 47; *Abramson v. Pataki,* 278 F.3d 93, 101 (2d Cir. 2002); *Aponte v. Calderon*, 284 F.3d 184, 195-97 (1st Cir. 2002); *Atwell v. Lisle Park District,* 286 F.3d 987, 992-93 (7th Cir. 2002); *Canon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999).

> The State, in declining to rehire respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract, on a charge, for example, that he had been guilty of dishonesty, or immorality. *Had it done so, this would be a different case.* . . . In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Roth, 408 U.S. at 573 (emphasis added).

Similarly, in *Codd v. Velger*, 429 U.S. 624, 627 (1977), the lack of even an allegation that the statement at issue "was substantially false," an element of any defamation claim, doomed the plaintiff's defamation-based civil rights claim, resulting in a *per curiam* reversal of the Court of Appeals. *See also id.* at 636 (Stevens, *J.*, dissenting) ("[I]f he claims that the discharge deprived him of liberty, he does have the burden of proving that he was stigmatized."). Thus, the lack of an essential element of the underlying tort of defamation is fatal to this due process claim.

The respondent's claim that Connecticut's SORL stigmatizes him as "currently dangerous" fails to establish a defamation claim in two ways. First, the supposed "false suggestion" of dangerousness does not suffice as a matter of law to give rise to a false stigma, and therefore is not actionable as a constitutional claim. Second, given the inclusion of over 2000 convicted sex offenders on the Registry, the implication of dangerousness cannot be considered "of and concerning" any particular registrant or registrants.

A. The Dissemination Of Truthful Information About Sex Offenders Does Not Stigmatize The Respondent.

To make out a defamation claim and thereby invoke the protections of the due process clause, a plaintiff must demonstrate that the statement that he alleges to be defamatory is "substantially

false." *Codd*, 429 U.S. 624, 627 (1977); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).[12/] The respondent's defamation claim in this case fails as a matter of law primarily because the Registry communicates no "substantially false" statement. The Court of Appeals' determination that the publication of "concededly true" conviction information in Connecticut's Registry somehow gives rise to a false implication stretches the bounds of logic and defamation law beyond the breaking point. *Doe v. Public Safety*, 271 F.3d at 47. Moreover, by enjoining the publication of accurate conviction information absent the addition of potentially inaccurate information, the lower court's holding runs contrary to principles of an open society and our federal system of government.

1. The Truthful Conviction Information In The Registry Does Not Imply A False Statement Of Current Dangerousness.

The Court of Appeals noted particularly that all of the information *explicitly* imparted by the DPS about the registrants -- "that they are persons convicted of crimes characterized by the State as sexual offenses"-- is "concededly true." *Id.* To arrive at a conclusion of falsity, therefore, the Court of Appeals, like the District Court, resorted to the doctrine of defamation by implication, a doctrine previously unrecognized in constitutional defamation law.[13/]

12/ The Courts of Appeals have uniformly required that to give rise to a due process claim the alleged defamatory statement must be false or sufficiently challenged as false. *See Abramson v. Pataki*, 278 F.3d at 101-102 (2d Cir. 2002); *Canon v. West Palm Beach*, 250 F.3d at 1301; *Llamas v. Butte Community College Dist.*, 238 F.3d 1123, 1129 (9th Cir. 2001); *Ersek v. Springfield*, 102 F.3d at 83-84 (3d Cir. 1996); *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir. 1996).

13/ Defamation, typically a common-law tort under state law, takes on constitutional dimensions in two circumstances: (a) due process claims under *Paul v. Davis*, and (2) first amendment limitations under *New York Times v. Sullivan* and its progeny. The purported implied communication in this case -- that all registrants are dangerous -- is not one that would be

The Court of Appeals correctly noted that the District Court "was not entirely clear . . . as to how public dissemination of the registry falsely stigmatizes the plaintiff." *Id.* at 48.[14/] Rather, the Court of Appeals found two "possible explanations" in the District Court's reasoning: "[1] that the registry *implies* that every person listed therein is in fact dangerous; and [2] that it *implies* that some of the registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous." *Id.* (emphasis added).

Reasoning that the disclaimer on the website was at least effective enough to convey that the Registry includes "*both* dangerous and non-dangerous offenders," the Court of Appeals rejected the District Court's first possible explanation: that "visitors to the website necessarily understood it to say or imply that *all* of the registrants are in fact currently dangerous." *Id.* at 49 (emphasis added). The Court of Appeals accepted, however, the conclusion that the Registry necessarily communicated "the message that *some* registrants are currently dangerous." *Id.* (quoting *Doe v. Lee*, 132 F. Supp.2d at 64 (emphasis in original)). Then, standing logic on its head, the Court stated: "Even the disclaimer itself, by asserting that

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recognized as defamatory by even the most generous of state court common defamation standards. Those standards, therefore, are highly instructive in establishing the contours of a liberty interest protected by the due process clause. This Court has certainly never recognized the availability of an implication-based defamation claim against a governmental defendant, let alone established the elements of such a claim. Such a claim based on the dissemination of truthful information by a government to its citizenry is, to say the least, a novel one in this Court.

14/ Not only was the District Court "less than clear" on the stigma issue, it essentially admitted that no defamation had occurred:

> A person viewing any one registrant's information is told that the State has not assessed the registrant's risk of reoffense and has not determined whether he is currently dangerous. *While it is true, then, that the viewer has no reason to think the registrant is one of those who is dangerous*, the viewer also has no reason to think the registrant is not dangerous.

Doe v. Lee, 132 F. Supp.2d at 64 (emphasis added).

the DPS 'has made no determination that any individual included in the Registry is currently dangerous' clearly implies that some [individuals] *may* be." *Doe v. Public Safety*, 271 F.3d at 49 (emphasis added). Building one implication on another, the Court of Appeals reasoned that "it follows that publication of the registry *implies* that each person listed is *more likely than the average person* to be currently dangerous." *Id.* (emphasis added). "This implication stigmatizes *every person* listed on the registry." *Id.* (emphasis added). Finally, the Court of Appeals concluded: "Publication of the registry in its present form *implies* that persons listed on the registry are particularly likely to be currently dangerous." *Id.* at 50 (emphasis added).

The fallacy of the Court of Appeals' conclusion is self-evident. As a factual matter, the supposed and implicit "false" communication -- that a convicted offender is currently considered dangerous -- is expressly disclaimed. In fact, the *only* explicit statement addressed to the issue of "dangerousness" is the statement that no consideration or assessment of an offender's dangerousness has been undertaken or is intended to be communicated.

More fundamentally, as a legal matter, the Court of Appeals' "defamation by implication" theory does not hold up, depriving the respondent of the very foundation of his due process claim. Very simply, no precedent exists for the proposition that constitutional defamation can lie when the false or defamatory meaning allegedly implied by the communication of concededly true facts is explicitly disclaimed.

Although no consensus has emerged in the courts on the existence or the standard for the doctrine of "defamation by implication," the District of Columbia Circuit Court of Appeals has enunciated a test that is "rapidly becoming a standard for those jurisdictions that recognize implication claims." B. Sanford, *Libel and Privacy*, § 6.6, at 240.11 (2d ed. 1987).

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication,

> by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends or endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990) (emphasis added); *accord, Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1064-65 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1997).

Neither the Court of Appeals nor the respondent point to any "undisclosed facts" that would eliminate any purported implication of dangerousness were such facts simultaneously communicated with registrants' conviction information. Is there any legitimate modification to the website in the form of more or less information that would make it less likely, to the respondent's mind, to convey a false impression? If there is not, then the claim of defamation by implication must fail, for only truthful information without omission or innuendo is being conveyed regarding any individual registrant or as to all registrants collectively.[15/]

15/ The respondent does not contend that state officials could not make a statement with regard to a *single* sex offender -- that he had been convicted of a sex offense and could be found living at a certain address. Presumably, some recipients of that statement would, on their own, conclude that the offender is dangerous based merely on the fact of the crime, rather than the means or method of publication. The Court of Appeals, however, concluded that by collecting accurate statements regarding all convicted sex offenders, the State conveys the "false implication" that all registrants are particularly likely to be dangerous. If this is true, then a statement conveying accurate conviction information about two or more convicted felons will always defame both or all of them, falsely implying that they are dangerous by including them together notwithstanding the information as to each is truthful. Under this reasoning, statements regarding the conviction history of more than one offender (or some minimal number of offenders) can never be made by any entity, public or private, without an actionable false implication being made at the same time.

In fact, DPS explicitly dispelled any such potentially false impression that the respondent or any given individual is considered dangerous.[16/] It would be paradoxical to say the least to conclude that the disclaimer is the cause of the alleged stigma. The disclaimer is not obtuse, confusing or unclear. It is direct and explicit enough to overcome any speculative misunderstanding about the intent of the public access to the Registry that the respondent attributes to the hobgoblin of innuendo or implication. Thus, the disclaimer fatally undercuts the respondent's stigma claim; it certainly does not support it. Rather, the most that might be said is that some viewers of the information might subjectively conclude that anyone convicted of a sexual offense may be dangerous, regardless of what appears on the Registry. This "inference," even if it "can be reasonably drawn," does not suffice to establish defamation in this context.[17/] *White,* 909 F.2d at 520.

Perhaps because recognizing actions for defamation by implication can work to limit free access to truthful information, courts that have recognized defamation by implication often impose limitations on the doctrine. B. Sanford, *Libel and Privacy*, § 6.6, at 240.11 (2d ed. 1987 & 1997 Supp.); R. Sack, *Sack On Defamation* § 2.4.5, at 2-30 (3d ed. 2002). In fact, Connecticut's Supreme Court has declined to recognize such a cause of action when the plaintiff could point to no additional "undisclosed facts" that would,

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16/ The respondent blames other attributes of the Registry, in addition to simple conviction information, for implying that all offenders listed thereon are dangerous, such as the fact that current addresses and pictures are included, thus giving the impression that current information is necessary due to the offenders' current "dangerousness." This is a specious argument. Address information provides a context for the information on the website and serves to limit interest in that information by limiting the universe of persons seeking out information as to individual registrants by precluding persons not in proximity to the offender.

17/ Nor is it at all certain that the inference *will* be drawn, or drawn uniformly. Different people will respond in different ways to accurate information regarding criminal convictions.

if included, have diminished any false implication. *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 322-23, 477 A.2d 1005 (1984). Other courts have similarly required private plaintiffs to point to "a specific material omission[] which, if published, would have rendered" the statement nondefamatory. *See, e.g., Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, 503 U.S. 907 (1992); *Toney v. WCCO*, 85 F.3d 383, 392 (8th Cir. 1996). Neither the Court of Appeals nor the respondent has pointed to any additional, accurate information that, if disclosed, would have prevented an inference of dangerousness.

The respondent's goal of secreting Registry information from public access not only lacks any constitutional validity under the due process clause, it runs contrary to constitutional precepts, embodied in the First Amendment, which ensure "that debate on public issues should be uninhibited, robust and wide-open," *Sullivan*, 376 U.S. at 270, and demand the elimination of judicial barriers to truthful speech. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 767-77 (1986). Courts must remain always vigilant against obstructing the conveyance of truthful information to the public. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 2426 (2001); *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 1761 (2001); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). Specifically, the Court concluded that when the delineation between truthful and untruthful communications is uncertain, constitutional principles "require us to tip [the scales] in favor of protecting true speech." *Hepps*, 475 U.S. at 776. This is particularly appropriate when the truthful information imparted is a matter of public concern. *Florida Star v. D.J.F.*, 491 U.S. 524, 536 (1989). After all, "[t]ruth may not be the subject of either civil or criminal sanctions where discretion of public affairs is concerned." *Garrison*, 379 U.S. at 74.

In particular, this Court in *Paul* itself rejected an argument that the Constitution prevents a state from "publicizing a record of an official act such as an arrest." *Paul*, 424 U.S. at 713.[18/] Here,

18/ In orally explaining its injunction Order, the District Court made clear how little value it placed on the public's right to access and use this information. The Court ruled that the onus is entirely on law enforcement,

with the dissemination of concededly truthful information of unquestionable concern and interest to the public on the one hand, and at worst a possible inference of dangerousness on the other, the constitutional principle of preserving truthful speech demands that the latter be rejected.

Naturally, any time there is a truthful communication regarding an individual's criminal conviction history, some persons may form a negative impression based on that information. However, this negative impression arises not because of the communication, but because of the underlying conviction. Criminal convictions of all kinds remain of interest to the public, are available to the public in record form and may be reported on by the press, resulting in the "beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *see also id.* at 493, 495-96. Given the public's right to access and make available criminal conviction information, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), and the state's obligation to do so, the *accurate* reporting of criminal conviction information cannot be considered defamatory.[19/] This impression arises, not from the State's

as opposed to the public, to attempt to prevent sex assaults; the public can have no opportunity to provide itself with accurate, undifferentiated information to take any precaution, however slight, on the basis of that accurate information. Rather, the District Court stated, "If . . . the order might imperil school children . . . then I would urge the Attorney General to *tell the people involved in law enforcement* to be more alert." JA 198. (emphasis added).

19/ The State of New York, for example, provides a statutory privilege in libel actions for any "fair and true report of any judicial proceeding." NY CLS Civ. R. § 74 (2002). Indeed, one suit arising out of Connecticut which challenged as defamatory statements by the media regarding the plaintiff's criminal convictions was held dismissable as frivolous pursuant to 28 U.S.C. § 1915(a). *Urbano v. Sondern*, 41 F.R.D. 355 (D. Conn.) (Zampano, *J.*), *aff'd*, 370 F.2d 13 (2d Cir. 1966), *cert. denied*, 386 U.S. 1034 (1967). Likewise, defamation actions challenging accurate reports of criminal convictions are often considered deficient for lack of actual damages. *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975).

publication of the Registry of convicted sex offenders, but from those offenders' own criminal conduct.

Neither the respondent nor the Court of Appeals offered any justification for creating a different defamation standard for a governmental defendant than a private one in the context of disclosing accurate conviction information.[20/] In fact, *Paul v. Davis* specifically cautioned against construing the due process clause expansively to allow all common law torts that could be brought against a private defendant to give rise to constitutional causes of action when brought against governmental actors. *Paul*, 424 U.S. at 702. Certainly, the lower courts provide no justification for creating constitutional liability for communications that a private entity could make with impunity.

2. The Due Process Clause Does Not Mandate The Dissemination Of Potentially Inaccurate Predictions Of Future Behavior.

Ironically, the lower courts in this case held that the State could only constitutionally disseminate the truthful conviction information already compiled in the Registry by including *additional*, highly subjective and potentially unreliable information: namely, the State must hold a hearing to assess or predict, an already convicted offender's dangerousness.[21/] In addition to being counter-intuitive, this approach deprives states of the discretion to make their own choices about the appropriateness of such "risk assessments," discretion that Congress has specifically afforded states under the Wetterling Act. Instead, a state must undertake an

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20/ There is certainly no federal common law recognizing defamation by implication claims against governmental defendants.

21/ *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1083-84 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109, 1110 (1998) (Describing three-tiered system of sex offender classification in New Jersey); *Doe v. Pataki*, 3 F. Supp.2d 456, 471-72 (S.D.N.Y. 1998) (Describing three-tiered system of sex offender classification in New York).

imprecise and controversial "risk assessment" process with all its faults, or permit no publication of this truthful data at all.

Predictions about future dangerousness, expert or otherwise, are at best largely problematic and at worst wholly unreliable. "The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific." *Flores v. Johnson*, 210 F.3d 456, 463 (5th Cir.) (Garza, *J.*, concurring) (rejecting psychiatrist's testimony regarding "future dangerousness" pursuant to requirements set by this Court for expert testimony.), *cert. denied*, 531 U.S. 987 (2000). Indeed, The American Psychiatric Association has informed this Court that a psychiatrist's prediction of "future dangerousness," is not "always wrong with respect to future dangerousness, only most of the time." *Barefoot v. Estelle*, 463 U.S. 880, 900 (1983). This Court has, very recently, recognized the inherent difficulty in predicting future behavior. *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 870 (2002).[22/] Connecticut's Supreme Court has likewise noted that "psychiatric predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable." *State v. Putnocki*, 200 Conn. 208, 219-20, 510 A.2d 1329, 1335 (1986) (citations omitted).

Given the inherent difficulty in predicting future dangerousness, Connecticut's legislature, like legislatures in 18 other states,[23/] has declined to include a risk assessment of sex offenders as part of their public notification. These states choose to

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22/ This is not to suggest that a prediction of future behavior is beyond the realm of judicial (or agency) endeavor. But the limits of such an endeavor are undeniable. The "evidence is overwhelming" that "the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." *Barefoot*, 463 U.S. at 920 (Blackman, *J.*, dissenting) (internal quotes, citations omitted).

23/ Center for Sex Offender Management, *Sex Offender Registration: Policy Overview & Comprehensive Practices* at 6 (Oct. 1999))available at www.csom.org/pubs/sexreg.html).

avoid the risk of providing inaccurate assessments of dangerousness, in favor of providing to the public only information whose accuracy can be verified.[24/] The choice not to undertake a prediction of future dangerousness is specifically permitted by the Wetterling Act, and moreover reflects the State's own policy determination that a risk assessment system is neither the best use of its resources, nor the best way for it to comply with the Wetterling Act's requirement that accurate information regarding convicted sex offenders be made available to the public.

This Court has emphasized the "societal costs" inherent in forcing policy choices upon states based on judicial determinations of the requirements of due process "rather than from the normal processes of community debate and legislative action." *Ingraham v. Wright*, 430 U.S. 651, 681 (1977). Fundamental notions of federalism demand respect for the policy judgments of state legislatures. *Lewis v. Casey*, 518 U.S. 343, 385 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 131-33 (1995). Although some states might choose to undertake risk assessments, the Fourteenth Amendment's due process clause does not require that choice. Indeed, for most lay people and experts, the most accurate predictor of future risk (as distinguished from "dangerousness") is the fact of a previous conviction or convictions. *See* U.S. Sentencing Commission, *Report to the Congress: Sex Offenses Against Children*, at 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sex offenses, is the most important and accurate predictor of future sex offending.").

24/ This legislative policy choice is similarly reflected in the clear and explicit disclaimer on the website that Connecticut's sole criteria for inclusion in the Registry is an offender's conviction history.

B. An Implied Statement Regarding A Group Is Insufficient To Establish Defamation As To One Member Of A Group Numbering Over 2000.

The purported "implicit" defamatory statement, relied upon by the lower courts in this case, is deficient in another regard. Black-letter defamation law requires that an alleged defamatory statement must be "of and concerning" a plaintiff in order to be actionable. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); *Rosenblatt v. Baer*, 383 U.S. 75, 79-82 (1966). When allegedly defamatory statements are made about a group, an individual must be individually defamed for that individual to have a valid defamation claim. *Sullivan*, 376 U.S. at 289. A defamatory statement concerning a group is actionable, according to the *Restatement (Second) of Torts*, "*only if*":

> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

Restatement (Second) of Torts, § 564a (1977) (emphasis added).

Under this so-called group defamation doctrine, *Arcand v. The Evening Call Publishing Co.*, 567 F.2d 1163, 1163 (1st Cir. 1977), a plaintiff must establish some reasonable personal application of the alleged defamatory communication to himself. When the group is so large that there is no likelihood that a [recipient] would understand the [communication] to refer to any particular member of the group, "it does not defame any individual." R. Sack, *Sack on Defamation*, § 2.9.4, at 2-126 (3rd Ed. 2002). "That reasonable persons may or in fact do understand that the plaintiff is being referred to individually becomes irrelevant when the group is too large." *Id.* Moreover, there is a "recognition

that freedom of expression [is] inconsistent with the ability of large groups of people to maintain [defamation] actions." *Id.* at 2-132.

"[I]t is not possible to set definite limits as to the size of the group or class, but the cases in which recovery [for defamation by any individual member of the group] has been allowed usually have involved numbers of 25 or fewer." *Restatement (Second) of Torts*, § 564a, comment b. Groups made up of as many as 161 individuals have been held to be too large for any member of the group to be defamed by a statement concerning all of them. *Restatement (Second) of Torts*, § 564a, illust. 2. The reason for this is obvious: as the size of any group increases, "it becomes more and more difficult for one to show that he was the one at whom the statement was directed." *Kentucky Fried Chicken of Bowling Green v. Sanders*, 563 S.W.2d 8, 9 (Ky. 1978) (per curiam).

In this case, the group consists of literally thousands of individuals.[25/] The Court of Appeals itself concluded that any statement concerning "dangerousness" that can be implied by the Registry is only reasonably attributable to "some" members of the group, and is certainly not attributable to any specific member of the group. *Doe v. Public Safety*, 271 F.3d at 49. Indeed, this is precisely the Court of Appeals' criticism of the Registry: that it is undifferentiated as to the group members. Given the size of the Registry and the nature of the alleged implicit statement, no cause of action for defamation can arise, and the respondent's due process claim must fail.

Abramson v. Pataki, 278 F.3d 93, 101 (2d Cir. 2002), a due process decision issued by the same Court of Appeals, held that a defamatory statement about a group much smaller than Connecticut's Registry group could not constitute defamation even when the statement specifically referred to a majority of the group. *Id.* In *Abramson*, a union consisting of 191 members claimed the deprivation of a liberty interest when the members were not hired or rehired, and alleged a defamatory statement, namely: "[A]t any given time on our floor we have estimated that over 65 percent of

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25/ As of May 15, 2001, 2,075 individuals were part of the Registry, with 1641of those registrants in compliance with the law. JA 172.

the personnel on the floor were either convicted felons or associated with organized crime." *Id.* at 97-102. The Court of Appeals, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), held that the challenged statement, even if false and defamatory, was insufficient due to the lack of a specific statement with respect to any one union member. "[A]n individual plaintiff must be clearly identifiable to support a claim for defamation." *Id.* at 102. Thus, the union's due process claim was flawed. *Id.* at 102-103.

Curiously, the inescapable force of its own later holding in *Abramson* eluded the Court of Appeals in the present case when it held that the "message that *some* registrants are currently dangerous is, and is intended to be communicated," *Doe v. Public Safety*, 271 F.3d at 49, and that "[p]ublication of the Registry in its present form implies that persons listed on the Registry are particularly likely to be currently dangerous. Unless everyone on the Registry is particularly likely to be dangerous . . . that implication is not true." *Id.* at 50.

Certainly, the Registry identifies each registrant personally as a convicted felon. But the individual statements on the Registry regarding each identifiable convicted registrant are true. The implication the Court of Appeals found to be false, that some registrants are dangerous, is not directed at any particular registrant, but at most to the group of registrants as a whole.

While the Court of Appeals found an implicit statement about the group of Connecticut registrants as a whole, this implicit statement -- that *some* registrants are dangerous and that all registrants are more likely to be dangerous than non-registrants -- is simply not sufficient. Even if the implicit statement of dangerousness is "defamatory of [registrants] as a group, . . . no individual [registrant] has a cause of action for libel." *Fowler v. Curtis Publishing Co.*, 182 F.2d 377, 378 (D.C. Cir. 1950).

Applying the group defamation doctrine to reject claims like the respondent's would comport with this Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). There, the Court held that states are not prevented under the due process clause from establishing general, irrebuttable classifications of persons, even

where those classifications might be erroneous as to some members of the class. *Id.* at 119-20. Allowing states to make such classifications without risk of incurring liability to individual class members preserves the states' autonomy in legislatively addressing pressing public concerns. It is certainly nonsensical in light of *Paul* for states to be liable under standards lower than those applied to private defendants and for conduct that involves the dissemination of truthful information.

II. The Respondent Cannot Establish That SORL's Public Access Provisions Deprived Him Of A Right Or Status Previously Recognized By State Law As Required By *Paul v. Davis*.

In *Paul v. Davis*, this Court clarified that an "interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *See Paul*, 424 U.S. at 712. "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 234 (1991). Consequently, defamation of an individual by a government actor does not, without more, implicate the procedural guarantees of the Due Process Clause of the Fifth or Fourteenth Amendments. *Paul*, 424 U.S. at 702. Thus, in order to preserve important federalism-based restrictions on the scope of the Fourteenth Amendment, the *Paul* Court held that it is insufficient merely to allege and prove the elements of defamation to prevail against a government defendant on a due process claim. Nor does it suffice to allege impairment of future employment opportunities, out-of-pocket losses, or other forms of damages that normally flow from defamatory conduct. *See Siegert*, 500 U.S. at 234. Rather, the Court held that to succeed on a defamation-based due process claim, a plaintiff must allege that "*as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished.*" *Paul*, 424 U.S. at 711 (emphasis added).[26/]

26/ Although this Court has not itself specifically adopted "stigma plus" as shorthand for the test it articulated in *Paul*, courts typically refer to this additional requirement as the "plus" component of the "stigma plus" test.

In holding that the respondent had sufficiently demonstrated harm beyond mere defamation (i.e., "stigma-plus"), the opinion of the Court of Appeals contravenes *Paul* in several key respects. First, the Court of Appeals' formulation of what may constitute adequate "plus" factors significantly and erroneously expands this Court's narrow and limited ruling in *Paul*. Second, the Court of Appeals ignored this Court's requirement that the asserted plus factors be caused by, and not merely temporally related to, the allegedly defamatory governmental conduct. Finally, the plus factors the Court of Appeals relied upon are simply inadequate under *Paul* to make out a due process claim.

A. The Court Of Appeals' Expansive Misapplication Of The "Plus" Requirement Threatens *Paul's* Limiting Principles.

Paul's requirement that a plaintiff allege and prove an alteration or extinguishment of a right or status previously recognized by state law was grounded on a purposefully circumscribed conception of the Fourteenth Amendment's due process clause that enforces important considerations of federalism. In particular, the *Paul* Court sought to avoid the "constitutional shoals" that would result from an application of the due process clause rendering the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul*, 424 U.S. at 701. The Court noted: "it is hard to perceive any logical stopping place" if due process protection is extended to interests traditionally protected by state tort law, an extension that "would come as a great surprise to those who drafted and shepherded the adoption of the [Fourteenth] Amendment[.]" *Id.* at 698.[27/]

See Siegert, 500 U.S. at 234 ("Siegert in this Court asserts that this assumption was correct -- that if the defendant acted with malice in defaming him, what he describes as the "stigma plus" test of *Paul v. Davis* is met.").

27/ The general principle of *Paul* -- that overlap between traditional tort

Thus, limiting defamation claims by requiring an adequate showing of harm in addition to stigma flows logically and constitutionally from the larger principle that not "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." This principle itself flows from federalism principles. *Id.* at 693; *City of Boerne v. Flores*, 521 U.S. 507, 520-524 (1997) (discussing history of Fourteenth Amendment, and particularly the premium framers placed on avoidance of intrusion by federal

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law causes of action and procedural due process claims brought pursuant to 42 U.S.C. § 1983 should be avoided -- applies without regard to whether, in a particular case or a particular jurisdiction, the plaintiff would actually have redress under tort law, unimpeded by common law, constitutional or statutory immunities. Indeed, in *Paul*, the Court did not address whether immunities or other impediments existed under Kansas law or some other source that would have prevented the plaintiff from pursuing his defamation claim in state court. Rather, the *Paul* Court rejected the notion that reputational interests are protected under the Fourteenth Amendment, not because a state tort remedy was actually available to the *Paul* plaintiff, but rather because reputational interests are the sort of interests that states can and often do protect. *Paul*, 424 U.S. at 712 (The states "*may* protect [reputational interests] against injury by virtue of its tort law, providing a forum for vindication by means of damages actions." (emphasis added)).

In *Siegert*, this Court applied the reasoning of *Paul* to reject a defamation-based *Bivens* claim brought by a federal government psychologist against his former supervisor. *Siegert*, 500 U.S. 226 (1991). The Court so held despite the fact that no common law defamation claim could lie against the government under the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. § 2680(h). *Siegert*, 500 U.S. at 234. Nor did the *Siegert* Court consider whether the individual defendant himself was shielded by the FTCA's discretionary function exemption, *see* 28 U.S.C. § 2680(a), or some other statutory, constitutional or common law defense or immunity. As in *Paul*, the Court in *Siegert* did not base its ruling on whether a state or federal common law tort remedy was available to the plaintiff, but rather on the fact that "defamation . . . is a tort actionable under the law of *most* states, but not a constitutional deprivation." *Siegert*, 500 U.S. at 234 (emphasis added).

government into "traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution.")[28/]

Starkly contravening the spirit of *Paul*, the Court of Appeals held that a plaintiff meets the plus factor requirement if he merely "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state law defamation suit." *Doe*, 271 F.3d at 56. Alternately, the Court of Appeals suggested that a plaintiff need show only that a governmental defendant acted in a way that was "governmental in nature" and "not trivial." *Id.* at 54-55.

This milquetoast formulation clearly expands *Paul*'s narrow plus test, and manifestly undermines the important federalism concerns that *Paul* was based upon, broadly sweeping reputational interests of traditional state concern into the ambit of the Fourteenth Amendment. There will exist some "indicium of material government involvement unique to the government's public role" in virtually every claim against a state actor. *Id.* at 56. By simple force of the fact that the alleged defamatory statement was uttered by a governmental agency or official acting in his official capacity, the statement, carrying as it does the added force of an official act, is distinguishable from that of a private person. However, as *Paul* indisputably established, not every defamatory governmental statement -- even those unique to the government's role as government -- states a constitutional claim.

It is no limitation at all to premise the availability of a constitutional due process claim on whether the defendant is acting

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28/ *See also Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." (internal citations omitted)). *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, *J.*, concurring) ("The common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer." (citing *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)).

in a manner unique to the government's public role. Rather, this limitation is largely illusory given that 42 U.S.C. § 1983 applies only to acts taken "under color of state law." *See, e.g., Parratt*, 451 U.S. 527, 549 (1981) (Powell, *J.* concurring) ("To be sure, even where there has been an intentional deprivation of property, due process claims also must satisfy the requirement that the act be sufficiently linked to an official's state-created duties or powers to constitute 'state action.'").

Perhaps the best evidence that the Court of Appeals' test exceeded this Court's circumscribed holding in *Paul* is that the unsuccessful *Paul* plaintiff would likely have prevailed under the Second Circuit's permissive standard. Certainly, the act of compiling and distributing a list of names of active shoplifters as challenged in *Paul* -- a listing that included photographs and bore the imprimatur of both city and county law enforcement agencies -- was a "material government involvement unique to the government's public role." *Doe v. Public Safety*, 271 F.3d at 56.

The facts of *Paul* would appear to present a far stronger case than the respondent's challenge to the SORL's registration requirements. In *Paul*, individuals were identified as "active" shoplifters based merely on arrests, not convictions, and the shoplifting charges against the plaintiff in *Paul* were ultimately dismissed. *See Paul*, 424 U.S. at 695-96. Connecticut's registry, on the other hand, identifies only those who were convicted of enumerated offenses after receiving the full panoply of protections available in the criminal process. Moreover, the active shoplifter list at issue in *Paul* was sent unsolicited to merchants, in contrast to Connecticut's registry, which provides information only to individuals requesting it on the Internet or at local law enforcement agencies.[29/]

29/ The Court of Appeals' reformulation of the *Paul* test would also have resulted in different outcomes in two of this Court's principal cases relied on in *Paul*. In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), the plaintiffs challenged the United States Attorney General's listing of certain organizations as communist and his sharing of the list with the federal Civil Service Commission. According to the *Paul* Court's reading of *McGrath*, six of the eight participating justices agreed that the

In finding the existence of adequate plus factors, the Court of Appeals engaged in unprecedented and unsupported extensions of this Court's precedent, disregarding the fundamental distinction between tort and § 1983 law. While this sort of judicial stretching would be notable under any circumstances, it is particularly remarkable in a case governed by this Court's decision in *Paul*, a decision intended to impose substantial limitations on governmental defamation claims.

B. The Court Of Appeals Erroneously And Illogically Uncoupled The Plus Factor From The Alleged Stigma.

Relying solely on two of its own prior decisions, the Court of Appeals stated that the asserted plus factor need not result from the stigmatizing government act or practice. Rather, the Court of Appeals requires only that a "concurrent temporal link," in no

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designation and distribution of the Attorney General's list, absent an effect on tax, employment or other legal status, would be insufficient to state a due process claim. *Id.* at 704-705. Clearly, however, the Attorney General's designation and distribution represented material, uniquely governmental conduct that would qualify under the Court of Appeals' approach as an adequate plus showing.

Similarly, in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the individual plaintiff would clearly have met the Court of Appeals' plus test, but was deemed by this Court not to have stated a due process claim. The plaintiff was a short-order cook employed by a private food vendor at the Naval Gun Factory in Washington, D.C., a weapons production facility operated on federal land. The naval security officer for the facility and his supervisor, a Rear Admiral, determined without a hearing that the plaintiff had failed to meet minimum security requirements, resulting in her inability to enter her workplace. Clearly, making security clearance determinations is a material governmental act unique to its public role that would satisfy the Court of Appeals' plus test. Indeed, the Court in *McElroy* noted that in making a security determination the defendants had acted "in a proprietary military capacity;" that is to say, security determinations are uniquely governmental. *McElroy*, 367 U.S. at 896. Nevertheless, the Court ruled that the plaintiff had no constitutional right to a hearing prior to revocation of her security clearance. *Id.*

particular order, exist between the two. *Doe v. Public Safety*, 271 F.3d at 60 (citing *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 32 (2d Cir. 1994); *Brandt v. Board of Coop. Educ. Services*, 820 F.2d 41, 44-45 (2d Cir. 1987)). Based on this understanding of the plus requirement, the Court of Appeals held that the "temporal nexus" between the SORL's registration requirements and the public access provisions sufficed to support the existence of a liberty interest. *Doe v. Public Safety*, 271 F.3d at 60. Not suprisingly, this approach finds no support in this Court's prior decisions.

This Court requires the plaintiff in a constitutional defamation action to allege and prove that the existence of a plus factor is *caused* by the governmental defendant's allegedly stigmatizing conduct. As phrased by this Court in *Paul*, the plaintiff must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was altered or extinguished." *Paul*, 424 U.S. at 693 (emphasis added). In describing the nature of the due process violation caused by the state "posting" statute in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the *Paul* Court stated that "the governmental action taken in that case deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting,' therefore significantly altered her status as a matter of state law." *Paul*, 424 U.S. at 708; *see also Siegert*, 500 U.S. at 234. Plainly "the state action complained of" by the respondent in this case is the alleged defamatory statement implied by the Registry. The Court of Appeals did not, however, require as part of the respondent's due process showing that the alleged defamation caused a change in a right or status he previously held under Connecticut law.

Despite clear precedent from this Court requiring causation, the Court of Appeals excused the absence of a causal link between the alleged stigma and the identified plus factors by noting simply that its own precedent "has never required that the stigma and the plus arise from a single government act." *Doe v. Public Safety*, 271 F.3d at 60. Be that as it may, this Court's decisions even prior to *Paul* and *Siegert* made clear that the stigmatizing act and the plus

must arise from the same act or must flow inseparably one from the other. *See, e.g., United States v. Lovett*, 328 U.S. 303, 313-14 (1946); *McGrath*, 341 U.S. at 184-85; *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Peters v. Hobby*, 349 U.S. 331, 347 (1955); *McElroy*, 367 U.S. at 898; *Roth*, 408 U.S. at 577. Simply put, this Court has never recognized a procedural due process claim where the deprivation of a protected right or status (i.e., the "plus") is not caused by the alleged defamatory act of the governmental defendant.

Uncoupling the "plus" element from the stigma in favor of a "concurrent temporal link" requirement suggests no natural limits, creates real problems of application and offends basic principles of causation applicable in § 1983 actions. How far afield may a plaintiff search for a plus? At what point does the plus factor become too attenuated from the stigma? As long as the plus occurs in rough temporal proximity to the stigma, may any federal, state, or local regulation serve as a plus? The Court of Appeals did not appear to consider these questions, let alone answer them. On the other hand, requiring as this Court has, that the plus be "*a result of the state action complained of*," *Paul*, 424 U.S. at 696 (emphasis added), provides certainty as to limits and is consistent with principles of causation, which apply to claims made under § 1983. As this Court has held:

> The cardinal principle of damages in Anglo-American law is that of compensation for the injury *caused to plaintiff by defendant's breach of duty*. The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions found to have been violative of constitutional rights and *to have caused* compensable injury.

Carey v. Piphus, 435 U.S. 247, 254-55 (1978) (internal citations omitted) (emphasis added). The Court of Appeals' "temporal proximity" test entirely dispenses with the requirement of causation, thereby significantly broadening due process rights.

Not only did the Court of Appeals causally sever the plus factors from the asserted source of stigma, it approved a remedy that utterly failed to address those factors. Under the District Court's injunction, the asserted plus factors -- Connecticut's registration requirements -- remain fully operative. In approving this result, the Court of Appeals cavalierly sidestepped another fundamental precept of both tort and § 1983 law -- that the remedy be tailored to the wrong. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). This represents an unwarranted departure from this Court's previous due process defamation cases, in which the remedies directly prevented or redressed the stigmatizing conduct of the defendants which had caused the deprivation of a liberty or property interest. *See, e.g., Constantineau*, 400 U.S. at 435 (affirming injunction against application of potentially stigmatizing "posting" statute, which interfered with right under state law to purchase alcohol).[30/] Clearly, to arrive at its decision, the Court of Appeals was forced not only to misapply this Court's decision in *Paul*, but also to disregard fundamental principles concerning causation and remedies.

C. The Plus Factors Identified By The Court Of Appeals Are Inadequate Under *Paul v. Davis*.

Under any construction of *Paul* or other precedent of this Court, the Court of Appeals' identification of plus factors was

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30/ *See also Goss v. Lopez*, 419 U.S. 565, 584 (1975) (affirming injunction against application of statute providing for summary school suspensions, which potentially damaged students' reputations and interfered with statutory right to free public education); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (enjoining application of loyalty oath statute, which forbad payment of state employees who refused to take oath, where individuals potentially stigmatized by application of statute); *Peters v. Hobby*, 349 U.S. 331, 348-49 (1955) (holding that petitioner entitled to have expunged from record adverse finding by federal Loyalty Review Board, as well as any record of ruling that petitioner had been barred from federal employment as result of adverse loyalty finding).

erroneous. Significantly, the Court of Appeals did not find, as required by *Paul*, that the Registry's public access provisions had any impact at all on public or private employment or that they otherwise extinguished or altered a right or status "*previously recognized under state law.*" *Paul*, 424 U.S. at 711 (emphasis added). Rather, the Court of Appeals identified plus factors in the portions of Connecticut's statutory scheme that were not challenged at all as defamatory or stigmatizing, and that in fact remain in place under the District Court's injunction. These include the requirements of registration, address and photograph verification and updating, provision of a DNA sample, and vulnerability to criminal prosecution for failure to comply with registration requirements. While these provisions are not trivial and are essential to Connecticut's statutory scheme, they are not adequate under this Court's precedent to state a claim for deprivation of a liberty or property interest invoking due process protections.

The Court of Appeals characterized the SORL obligations imposed on registrants as "extreme and onerous," *see Doe v. Public Safety*, 271 F.3d at 57, but nowhere attempted to show that those obligations affected, let alone distinctly altered or extinguished, a right or status previously recognized by state law. Significantly, the Second Circuit did not point to any Connecticut law (or any other source of law) that granted convicted sex offenders an affirmative freedom from providing identifying information to state officials. Nor are such offenders disabled by the statutory scheme from seeking or receiving any state-created benefit or prevented from obtaining or retaining governmental or private employment. *See, e.g., Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000) (sex offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire."). While registrants must comply with certain statutory requirements by virtue of their conviction status, they are simply not prevented by SORL from doing or receiving anything.

In fact, from a regulatory perspective, there is nothing inherently onerous or even particularly remarkable about SORL's registration requirements. "Registration laws are common and their range is wide." *Lambert v. California*, 355 U.S. 225, 229 (1957);

see also Russell v. Gregoire, 124 F.3d 1079, 1089 (9th Cir. 1997) ("[R]egistration is typically and historically a regulatory measure."), *cert. denied sub nom Stearns v. Gregoire*, 523 U.S. 1007 (1998). Indeed, many of the statutory requirements identified as plus factors by the Court of Appeals have been held by that court and others not to impose legally significant burdens even where the obligations fall on citizens not convicted of crimes. *See, e.g., Tadros v. Commissioner of Internal Revenue*, 763 F.2d 89, 91 (2d Cir. 1985) (responsibility of taxpayer to provide change of address information not onerous); *St. Louis v. Alverno College*, 744 F.2d 1314, 1316 (7th Cir. 1984) (the burden of providing a change of address is minimal).[31/]

The Court of Appeals' misapplication of the plus requirement becomes more apparent still when contrasted against the types of deprivations this Court has held to implicate procedural due process protections. In fact, this Court's constitutional defamation decisions have typically required some significant interference with governmental employment before a due process claim can lie, harm clearly not alleged by the respondent in this case. *See Paul*, 424 U.S. at 706. ("This Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent accompanying loss of government employment."); *Lovett*, 328 U.S. at 314 (sustaining challenge to

31/ In fact, it is significant to note that in *Doe v. Pataki*, 120 F.3d 1265, 1285 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998), the Second Circuit Court of Appeals itself held in a closely related context that sexual offender registration requirements are not:

> so punitive in form or effect as to transform this regulatory measure into a punitive one. For instance, registration itself, which can usually be accomplished without public notice, (1) does not ordinarily result even in societal opprobrium or harassment, (2) does not serve the goals of criminal punishment and (3) does not resemble any measure traditionally considered punishment . . . Moreover, the legislature's decision to subject persons with a greater risk of re-offense to more onerous registration requirements is reasonable.

congressional act that forbade payment of any salary or compensation to specific governmental employees found to have engaged in subversive activity, noting that act "stigmatized [employees'] reputations and seriously impaired their chance to earn a living" and that act had effect of "prohibiting their ever holding government job."); *McGrath*, 341 U.S. at 184-85 ("[The plaintiff] not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation . . . . To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.").[32/] Of course, Connecticut's registration requirements do not impair any registrant's interest in governmental employment.

Even if this Court's decisions suggest that a narrow range of interests beyond those relating to governmental employment may serve as plus factors, such interests, unlike those affected by the registrations provisions, involve a right or status previously recognized by state law. For example, in *Wisconsin v. Constantineau*, the challenged statute made it a misdemeanor to sell or give liquor to persons posted on a list of hazardous drinkers. *Constantineau*, 400 U.S. at 433 n. 2. As the Court noted in *Paul*, the governmental action challenged in *Constantineau* "deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor in common with the rest of the citizenry."

32/ *See also Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (in finding requirement of executing state loyalty oath arbitrary, Court noted that petitioners would lose their teaching their positions at a state university for refusing to comply); *Peters v. Hobby*, 349 U.S. 331, 347 (1955) (noting impairment of interest in government employment in finding that Loyalty Review Board exceeded its powers); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (rejecting due process claim and noting that "this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an *attendant foreclosure from other employment opportunities*.") (emphasis added); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (recognizing that defamatory governmental action, in connection with refusal to rehire plaintiff, might state a procedural due process claim.).

Paul, 424 U.S. at 704. The Court noted further that "'[p]osting,' therefore, significantly altered [that individual's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified invocation of procedural safeguards." *Id.* at 704-05. Those subject to "posting," who were presumably otherwise qualified under Wisconsin's then-existing regulatory scheme to purchase alcohol, clearly suffered an alteration in a right and status previously recognized under Wisconsin law because of the posting. Conversely, Connecticut's registration requirements do not alter any previously recognized right or status held by convicted sex offenders.

Other interests that this Court has suggested might, when combined with governmental defamation, invoke the protections of procedural due process, include the revocation of the right to attend public schools or the loss of a tax exemption. *Paul*, 424 U.S. at 693, 710 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950) (tax exemption); and *Goss v. Lopez*, 419 U.S. 565 (1975) (public school)). For example, in *Goss v. Lopez*, a disciplinary school suspension, challenged as potentially defamatory and violative of due process, threatened the right to free public education guaranteed by state statute. *See Goss*, 419 U.S. at 567. Similarly, because tax exemptions like that at issue in *McGrath* only exist by virtue of statute and regulation, the revocation of such an exemption indisputably "alter[s] or exinguishe[s]" a "right or status previously recognized by . . . law." *Paul*, 424 U.S. at 711. The same simply cannot be said of Connecticut's registration requirements.

Because the "Fourteenth Amendment's procedural protection . . . is a safeguard of the security of interests that a person has already acquired in *specific* benefits," the registration requirements simply do not implicate the Amendment's due process guarantees. *Roth*, 408 U.S. at 576 (emphasis added). Moreover, this Court has held that the dimensions of an asserted interest must be recognized and defined by state law before it merits protection under the Due Process Clause. *Id.* at 577. Connecticut's registration requirements do not effect any interest that exists and is

specifically defined under state law. To the contrary, the respondent alleges merely an impairment of an intangible, amorphous interest in avoiding the imposition of governmentally created obligations that did not exist previously, but arise solely as a result of his conviction history. This hardly qualifies as the sort of concrete, definite, and previously recognized status or right anticipated in *Paul* as an adequate plus factor.

III. Conclusion

For the foregoing reasons, as well as those asserted in the supporting briefs of the Amici Curiae, the Court should reverse the decision of the Court of Appeals and remand with instructions to vacate the injunction entered by the District Court and direct judgment for the respondent. Connecticut's law does not deprive registrants of rights guaranteed by the Fourteenth Amendment; nor does it defame. To the contrary, the law at issue serves the vital interests of Connecticut's citizens by providing accurate, public information, information they should be free to evaluate, use or discard in deciding how best to protect themselves and their children. In this instance, the claims of the respondent "must yield to the dictates of public policy, which require that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860).

Respectfully submitted,

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No. _____

In The
Supreme Court Of The United States
October Term, 2001

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER
Petitioners,

v.

SAMUEL POE,
JOHN DOE
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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REGISTRATION OF SEXUAL OFFENDERS

Sec. 54-250. Definitions. For the purposes of sections 54-102g and 54-250 to 54-259, inclusive:

(1) "Conviction" means a judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment.

(2) "Criminal offense against a victim who is a minor" means (A) a violation of subdivision (2) of Section 53-21, subdivision (2) of subsection (a) of section 53a-70, subdivision (2), (4) or (8) of subsection (a) of section 53a-71, subdivision (2) of subsection (a) of section 53a-72a, subdivision (2) of subsection (a) of section 53a-86, subdivision (2) of subsection (a) of section 53a-87, section 53a-196a, 53a-196b, 53a-196c or 53a-196d, (B) a violation of section 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-96 or 53a-186, provided the court makes a finding that, at the time of the offense, the victim was under eighteen years of age, (C) a violation of any of the offenses specified in subparagraph (A) or (B) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (D) a violation of any predecessor statute to any offense specified in subparagraph (A), (B) or (C) of this subdivision the essential elements of which are substantially the same as said offense.

(3) "Identifying factors" means fingerprints, a photographic image, and a description of any other identifying characteristics as may be required by the Commissioner of Public Safety. The commissioner shall also require a sample of the registrant's blood taken for DNA (deoxyribonucleic acid) analysis, unless such sample has been previously obtained in accordance with section 54-102g.

(4) "Mental abnormality" means a congenital or acquired conditions of a person that affects the emotional or volitional capacity of the person in a manner that

predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(5) "Nonviolent sexual offense" means a violation of section 53a-73a.

(6) "Not guilty by reason of mental disease or defect" means a finding by a court or jury of not guilty by reason of mental disease or defect pursuant to section 53a-13 notwithstanding any pending appeal or habeas corpus proceeding arising from such finding.

(7) "Personality disorder" means a condition as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.

(8) "Registrant" means a person required to register under section 54-251, 54-252, 54-253 or 54-254.

(9) "Registry" means a central record system in this state, any other state or the federal government that receives, maintains and disseminates information on persons convicted or found not guilty by reason of mental disease or defect of criminal offenses against victims who are minors, nonviolent sexual offenses, sexually violent offenses and felonies found by the sentencing court to have been committed for a sexual purpose.

(10) "Release into the community" means, with respect to a conviction or a finding of not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, (A) any release by a court after such conviction or finding of not guilty by reason of mental disease or defect, a sentence of probation or any other sentence under section 53a-28 that does not result in the offender's immediate placement in the custody of the Commissioner of Correction; (B) release from a correctional facility at the discretion of the Board of

Parole, by the Department of Correction to a program authorized by section 18-100c or upon completion of the maximum term or terms of the offender's sentence or sentences, or to the supervision of the office of Adult Probation in accordance with the terms of the offender's sentence; or (C) release from a hospital for mental illness or a facility for persons with mental retardation by the Psychiatric Security Review Board on conditional release pursuant to section 17a-588 or upon termination of commitment to the Psychiatric Security Review Board.

(11) "sexually violent offense" means (A) a violation of section 53a-70, except subdivision (2) of subsection (a) of said section, 53a-70a, 53a-70b, 53a-71, except subdivision (1), (4) or (8) of subsection (a) of said section, 53a-72a, except subdivision (2) of subsection (a) of said section, or 53a-72b, or of section 53a-92 or 53a-92a, provided the court makes a finding that the offense was committed with intent to sexually violate or abuse the victim, (B) a violation of any of the offenses specified in subparagraph (A) of this subdivision for which a person is criminally liable under section 53a-8, 53a-48 or 53a-49, or (C) a violation of any predecessor statute to any of the offenses specified in subparagraph (a) or (B) of this subdivision the essential elements of which are substantially the same as said offense.

(12) "Sexual purpose" means that a purpose of the defendant in committing the felony was to engage in sexual contact or sexual intercourse with another person without that person's consent. A sexual purpose need not be the sole purpose of the commission of the felony. The sexual purpose may arise at any time in the course of the commission of the felony.

Sec. 54-251. Registration of person who has committed a criminal offense against a victim who is a minor or a nonviolent sexual offense. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense, and is released into the community on or after October 1, 1998, shall, within three days following such release, and whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and shall maintain such registration for ten years except that any person who has one or more prior convictions of any such offense or who is convicted of a violation of subdivision (2) of subsection (a) of section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after section 53a-70 shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a criminal offense against a victim who is a minor or a nonviolent sexual offense, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state provided that state has a registration requirement for such

offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 from the registration requirements of this section if the court finds that such person was under nineteen years of age at the time of the offense and that registration is not required for public safety.

(c) Notwithstanding the provisions of subsection (a) of this section, the court may exempt any person who has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a from the registration requirements of this section if the court finds that registration is not required for public safety.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-252. Registration of person who has committed a sexually violent offense.

(a) Any person who has been convicted or found not guilty by reason of mental disease or defect of a sexually violent offense, and (1) is released into the community on or after October 1, 1988, and prior to October 1, 1998, and resides in this state, shall, on October 1, 1998, or within three days of residing in this state, whichever is later, or (2) is released into the community on or after October 1, 1998, shall, within three days following such release, register such person's name, identifying factors, criminal history record, documentation of any treatment received for mental abnormality or personality disorder, and residence address with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct, and shall maintain such registration for life. Prior to accepting a plea of guilty or nolo contendere from a person with respect to a sexually violent offense, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another requirements of this section, and (B) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another

state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who has been subject to the registration requirements of section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of public act 97-183, shall, not later than three working days after October 1, 1998, register under this section and thereafter comply with the provisions of sections 54-102g and 54-250 to 54-259, inclusive.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, during the initial registration period following October 1, 1998, the Commissioner of Public Safety may phase in completion of the registration procedure for persons released into the community prior to said date over the first three months following said date, and no such person shall be prosecuted for failure to register under this section during those three months provided such person complies with the directives of said commissioner regarding registration procedures.

(d) Any person who violates the provisions of this section shall be guilty of a class D felony.

Section 54-253. Registration of person who has committed a sexual offense in another jurisdiction. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in any other state, in a federal or military court or in any foreign jurisdiction of any crime, the essential elements of which are substantially the same as any of the crimes specified in subdivisions (2), (5) and (11) of section 54-250 and who resides in this state on and after October 1, 1998, shall, within ten days of residing in this state, register with the Commissioner of Public Safety in the same manner as if such person had been convicted or found not guilty by reason of mental disease or defect of such crime in this state, except that for purposes of determining the ten-year period of registration under section 54-251 such person shall be deemed to have initially registered on the date of such person's release into the community in such other state, federal or military system or foreign jurisdiction.

(b) Any person not a resident of this state who is registered as a sexual offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the offender under the laws of any other state and who regularly travels into or within this state or temporarily resides in this state for purposes including, but not limited to employment or schooling shall, within three days after the commencement of such travel or residence in this state, register such person's name, identifying factors, criminal history record, locations visited on a recurring basis or residence address, if any, in this state, and residence address in such person's home state with the Commissioner of Public Safety on such forms and in such locations as said commissioner shall direct and shall maintain such registration until such travel or residence terminates or until

such person is released from registration as a sexual offender in such other state. If such person terminates such person's travel or residence in this state or changes such person's address in this state such person shall, within five days, provide notice in writing to the Commissioner of Public Safety.

(c) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-254. Registration of person who has committed a felony for a sexual purpose. (a) Any person who has been convicted or found not guilty by reason of mental disease or defect in this state on or after October 1, 1998, of any felony that the court finds was committed for a sexual purpose, may be required by the court upon release into the community to register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and to maintain such registration for ten years. If the court finds that a person has committed a felony for a sexual purpose and intends to require such person to register under this section, prior to accepting a plea of guilty or nolo contendere from such person with respect to such felony, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in fully understands the consequences of the plea. If such person changes such person's address such person shall, within five days, register the new address in writing with the Commissioner of Public Safety, and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall notify the Commissioner of Public Safety and shall also register with

an appropriate agency in that state, provided that state has a registration requirement for such offenders. During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address and shall submit to the retaking of a photographic image upon request of the Commissioner of Public Safety.

(b) Any person who violates the provisions of this section shall be guilty of a class D felony.

Sec. 54-255. Restriction on dissemination of registration information for certain offenders. (a) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person for a violation of section 53a-70b, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, the court finds that public safety requires that such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the such person's registration information be made available to the public or that a change of circumstances makes publication of such registration information no longer likely to reveal the identity of the victim within the community where the victim resides. Prior to ordering or removing the restriction on the dissemination of such person's registration information, the court shall consider any information or statements provided by the victim.

(b) Upon the conviction or finding of not guilty by reason of mental disease or defect of any person of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in

section 46b-21, the court may order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides. The court shall remove the restriction on the dissemination of such registration information if, at any time, it finds that public safety requires that such person's registration information be made available to the public or that a change in circumstances makes publication of the registration information no longer likely to reveal the identity of the victim within the community where the victim resides.

(c) Any person who: (1) Has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (1) of subsection (a) of section 53a-71 between October 1, 1988, and June 30, 1999, and was under nineteen years of age at the time of the offense; (2) has been convicted or found not guilty by reason of mental disease or defect of a violation of subdivision (2) of subsection (a) of section 53a-73a between October 1, 1988, and June 30, 1999; (3) has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, between October 1, 1988, and June 30, 1999, where the victim of such offense was, at the time of the offense, under eighteen years of age and related to such person within any of the degrees of kindred specified in section 46b-21; (4) has been convicted or found not guilty by reason of mental disease or defect of a violation of section 53a-70b between October 1, 1988, and June 30, 1999; or (5) has been convicted or found not

guilty by reason of mental disease or defect of any crime between October 1, 1988, and September 30, 1998, which requires registration under sections 54-250 to 54-259, inclusive, and (A) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (B) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which would require registration under sections 54-250 to 54-259, inclusive, and (C) has registered with the Department of Public Safety in accordance with sections 54-250 to 54-259, inclusive; may petition the court to order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, provided the court finds that dissemination of the registration information is not required for public safety.

Sec. 54-256. Responsibilities of courts and agencies in registration process. Any court, the Commissioner of Correction or the Psychiatric Security Review Board, prior to releasing into the community any person convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor, a nonviolent sexual offense, a sexually violent offense or a felony found by the sentencing court to have been committed for a sexual purpose, except a person being released unconditionally at the conclusion of such person's sentence or commitment, shall require as a condition of such release that such person complete the registration procedure established by the Commissioner of Public Safety under sections 54-251, 54-252 and 54-254. The court, the Commissioner of Correction or the Psychiatric Security Review Board, as the case may be, shall provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, and transmit the completed registration package to the Commissioner of Public Safety who shall enter the information into the registry established under section 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court, such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the 54-257. If a court transmits the completed registration package to the Commissioner of Public Safety with respect to a person released by the court such package need not include identifying factors for such person. In the case of a person being released unconditionally who declines to complete the registration package through the court or the releasing agency, the court or agency shall: (1) Except with respect to information that is not available to the public pursuant to court order, rule of court or any provision of the general statutes, provide to the

Commissioner of Public Safety the person's name, date of release into the community, anticipated residence address, if known, criminal history record, any known treatment history and any other relevant information; (2) inform the person that such person has an obligation to register within three days with the Commissioner of Public Safety for a period of ten years following the date of such person's release or for life, as the case may be, and that if such person changes such person's address such person shall within five days register the new address in writing with the Commissioner of Public Safety and, if the new address is in another state or if such person regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders; (3) provide the person with a written summary of the person's obligations under sections 54-102g and 54-250 to 54-259, inclusive, as explained to the person under subdivision (2) of this section; and (4) make a specific notation on the record maintained by that agency with respect to such person that the registration requirements were explained to such person and that such person was provided with a written summary of such person's obligations under sections 54-102g and 54-250 to 54-259, inclusive.

Sec. 54-257. Registry. Suspension of registration. Verification of address. (a) The Department of Public Safety shall, not later than January 1, 1999, establish and maintain a registry of all persons required to register under sections 54-251, 54-252, 54-253 and 54-254. The department shall, in cooperation with the Office of the Chief Court Administrator, the Department of Correction and the Psychiatric Security Review Board, develop appropriate forms for use by agencies and individuals to report registration information, including changes of address. Upon receipt of registration information, the department shall enter the information into the registry and notify the local police department or state police troop having jurisdiction where the registrant resides or plans to reside. If a registrant reports a residence in another state, the department shall notify the state police agency of that state or such other agency in that state that maintains registry information, if known. The department shall also transmit all registration information, conviction data, photographic images and fingerprints to the Federal Bureau of Investigation in such form as said bureau shall require for inclusion in a national registry.

(b) The Department of Public Safety may suspend the registration of any person registered under section 54-251, 54-252, 54-253 or 54-254 while such under civil commitment or residing outside this state. During the period that such registration is under suspension, the department is not required to verify the address of the registrant pursuant to subsection (c) of this section and may withdraw the registration information from public access. Upon the release of the registrant from incarceration or civil commitment or resumption of residency in this state by the registrant, the department shall reinstate the registration, redistribute the registration information in accordance with subsection (a) of this section and resume verifying the

address of the registrant in accordance with subsection (c) of this section. Suspension of registration shall not affect the date of expiration of the registration obligation of the registrant under section 54-251, 54-252 or 54-253.

(c) Except as provided in subsection (b) of this section, the Department of Public Safety shall verify the address of each registrant by mailing a nonforwardable verification form to the registrant at the registrant's last reported address. Such form shall require the registrant to sign a statement that the registrant continues to reside at the registrant's last reported address and return the form by mail by a date which is ten days after the date such form was mailed to the registrant. The form shall contain a statement that failure to return the form or providing false information is a violation of section 54-251, 54-252, 54-253 or 54-254, as the case may be. Each person required to register under section 54-251 or 54-254 shall have such person's address verified in such manner annually on the anniversary of such person's initial registration date. Each person required to register under section 54-252 shall have such person's address verified in such manner every ninety days after such person's initial registration date. Each person required to register under section 54-253 shall have such person's address verified in such manner either annually on the anniversary of such person's initial registration date or every ninety days after such person's initial registration date depending upon whether, after such initial registration, such person is subject to the requirements of section 54-251 or section 54-252, respectively. In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest under

section 54-251, 54-252, 54-253 or 54-254, as the case may be. The Department of Public Safety shall not verify the address of registrants whose last reported address was outside this state.

(d) The Department of Public Safety shall retake the photographic image of each registrant at least once every five years.

Sec. 54-258. Availability of registration information. Immunity. (a)(1) Notwithstanding any other provision of the general statutes, except subdivisions (3) and (4) of this subsection, the registry maintained by the Department of Public Safety shall be a public record and shall be accessible to the public during normal business hours. The Department of Public Safety shall make registry information available to the public through the Internet. Not less than once per calendar quarter, the Department of Public Safety shall issue notices to all print and electronic media in the state regarding the availability and means of accessing the registry. Each local police department and each state police troop shall keep a record of all registration information transmitted to it by the Department of Public Safety, and shall make such information accessible to the public during normal business hours.

(2) Any state agency, the Judicial Department, any state police troop or any local police department may, at its discretion, notify any government agency, private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under private organization or individual of registration information when such agency, said department, such troop or such local police department, as the case may be, believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration under section 54-251, 54-252, 54-253 or 54-254.

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, state agencies, the Judicial Department, state police troops and local police

departments shall not disclose the identity of any victim of a crime committed by a registrant or treatment information provided to the registry pursuant to sections 54-102g and 54-250 to 54-259, inclusive, except to government agencies for bona fide law enforcement or security purposes.

(4) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, registration information the dissemination of which has been restricted by court order pursuant to section 54-255 and which is not otherwise subject to disclosure, shall not be a public record and shall be released only for law enforcement purposes until such restriction is removed by the court pursuant to said section.

(5) When any registrant completes the registrant's term of registration or is otherwise released from the obligation to register under section 54-251, 54-252, 54-253 or 54-254, the Department of Public Safety shall notify any state police troop or local police department having jurisdiction over the registrant's last reported residence address that the person is no longer a registrant, and the Department of Public Safety, state police troop and local police department shall remove the registrant's name and information from the registry.

(b) Neither the state nor any political subdivision of the state nor any officer or employee thereof, shall be held civilly liable to any registrant by reason of disclosure of any information regarding the registrant that is released or disclosed in accordance with subsection (a) of this section. The state and any political subdivision of the state and, except in cases of wanton, reckless or malicious conduct, any officer or employee thereof, shall be immune from liability for good faith conduct in carrying out the provisions of subdivision (2) of subsection (a) of this section.

Sec. 54-258a. Warning against wrongful use of registry information. Any agency of the state or any political subdivision thereof that provides public access to information contained in the registry shall post a warning that states: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Such warning shall be in a suitable size and location to ensure that it will be seen by any person accessing registry information.

Sec. 54-259. Sexual Offender Registration Committee. (a) There is established a Sexual Offender Registration Committee consisting of the following members or their designees: The Chief Court Administrator, the Chief State's Attorney, the Commissioner of Public Safety, the Commissioner of Correction, the Secretary of the Office of Policy and Management, the chairman of the Psychiatric Security Review Board, the chairman of the Board of Parole, the director of the Office of Adult Probation, the President of the Connecticut Police Chiefs Association and two persons appointed by the Governor, one of whom shall be involved in the delivery of services to victims of sexual assault and one of whom shall be involved in the delivery of services to victims of crime. The Chief Court Administrator shall serve as chairperson of the committee. The Office of Policy and Management shall, within available resources, provide staff resources to the committee.

(b) On or before January 15, 1999, the Sexual Offender Registration Committee shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of shall submit a report to the Governor and the General Assembly. Such report shall make recommendations concerning the implementation of sections 54-102g and 54-250 to 54-259, inclusive, and shall address issues including (1) assuring interagency coordination to maximize the accuracy and timeliness of information contained in the registry, (2) complying with other applicable state and federal laws and regulations, (3) establishing a procedure by which registrants may apply to the sentencing court, not sooner than ten years after initial registration, to be relieved of their obligation to register, (4) establishing a board of

experts in the behavior and treatment of sexual offenders, to examine such applicants and make recommendations to the court in accordance with section 54-255, (5) developing guidelines for the state police and municipal police departments that shall set forth the circumstances in which individuals, private organizations and government agencies in their respective jurisdictions should be directly notified that a person subject to registration under sections 54-102g and 54-250 to 54-259, inclusive, is residing near their locations, and (6) any other fiscal, legislative and programmatic matters which affect the successful implementation of the registry.

Sec. 54-260. (Formerly Sec. 54-102s). Notification of change of address of sexual offenders on parole or probation. (a) For the purposes of this section, "sexual offender" means any person convicted of a violation of subdivision (2) of section 53-21, section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b committed on or after October 1, 1995.

(b) Any sexual offender who is released from a correctional institution on parole or who is sentenced to a period of probation shall, during the period of such parole or probation and as a condition of such parole or probation, immediately notify his parole officer or probation officer, as the case may be, whenever he changes his residence address. Each parole officer or probation officer who is notified of such change of address shall notify the chief of police of the police department or resident state trooper for the municipality of the new address of the parolee or probationer and any other law enforcement official he deems appropriate.

(c) Nothing in this section shall be construed to prohibit a parole officer or probation officer acting in the performance of his duties and within the scope of his employment from disclosing any information concerning the parolee or probationer to any person whenever he deems such disclosure to be appropriate.

Sec. 54-261. Community response education program. (a) The Office of Adult Probation, in conjunction with state-wide experts in law enforcement, the treatment of sexual offenders and sexual assault victim services, shall, within available appropriations, develop a community response education program to be offered to neighborhoods and municipalities that have been notified pursuant to section 54-258 that a person who has registered under said section is or will be residing in that community.

(b) The purpose of such program shall be to assist neighborhoods, parents and children to learn how to better protect themselves from sexual abuse and sexual assault. The program shall develop educational materials and community information resources on prevention and risk reduction concerning sexual abuse and sexual assault and the enforcement of requirements concerning the registration and supervision of sexual offenders and the notification of communities where such offenders reside.

(c) The program may include the following:

(1) An initial community meeting following a community notification, sponsored by the Office of Adult Probation and held in conjunction with the chief of police, chief elected officials, the superintendent of schools and other municipal officials of the community, to discuss the implementation of the statutory requirements concerning the registration of a sexual offender and the notification of the community where such offender resides, to provide information on the crime or crimes involved and to provide information on how the offender will be monitored by the Office of Adult Probation and the specific conditions of probation applicable to the offender;

(2) Information on how and where concerned residents may report observed violations by an offender of the conditions of such offender's probation;

(3) Resources to educate families and children in the prevention and avoidance of sexual abuse and sexual assault and for parents seeking supportive methods for discussing relevant issues with their children;

(4) Resources on when and how a community may wish to establish a network of "Safe Houses" for neighborhood children to use when they seek safe shelter or the creation of a neighborhood block watch or crime watch;

(5) Resources for police departments and boards of education to use in consulting with parents on appropriate school-based classroom programs stressing safety, prevention and risk reduction and to use in developing educational programs for parents to discuss relevant issues with their children;

(6) Compilation and distribution of a list of child protective agencies, child guidance clinics and rape crisis centers for families seeking more in-depth counseling after a community notification has occurred.

(d) The Office of Adult Probation may apply for and receive grants from the federal government or any agency thereof or from any foundation, corporation, association or individual for purposes of the development of the community response education program under this section.

42 U.S.C. 14071 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

(a) In general.

(1) State guidelines. The Attorney General shall establish guidelines for State programs that require--

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6); and

(B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6).

(2) Determination of sexually violent predator status; waiver; alternative measures.

(A) In general. A determination of whether a person is a sexually violent predator for purposes of this section shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

(B) Waiver. The Attorney General may waive the requirements of subparagraph (A) if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator.

(C) Alternative measures. The Attorney General may also approve alternative measures of comparable or

greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders in lieu of the specific measures set forth in this section regarding sexually violent predators

(3) Definitions. For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;
(ii) false imprisonment of a minor, except by a parent;
(iii) criminal sexual conduct toward a minor;
(iv) solicitation of a minor to engage in sexual conduct;
(v) use of a minor in a sexual performance;
(vi) solicitation of a minor to practice prostitution;
(vii) any conduct that by its nature is a sexual offense against a minor; or
(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State--

(I) makes such an attempt a criminal offense; and
(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term "sexually violent offense" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of

offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code, or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18, United States Code, or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(F) The term "employed, carries on a vocation" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(G) The term "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary

school, trade, or professional institution, or institution of higher education.

(b) Registration requirement upon release, parole, supervised release, or probation. An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials.

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall--

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1), the State case may be, shall obtain

the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry.

(A) State reporting. State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting. A State shall participate in the national database established under section 170102(b) [42 USCS § 14072(b)] in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification.

(A) For a person required to register under subparagraph (A) of subsection (a)(1), State procedures shall provide for verification of address at least annually.

(i)--(iv) [Deleted]

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1), except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address. A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another state. A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

(6) Length of registration. A person required to register under subsection (a)(1) shall continue to comply with this section, except during ensuing periods of incarceration, until--

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or

(B) for the life of that person if that person--

(i) has 1 or more prior convictions for an offense described in subsection(a)(1)(A); or

(ii) has been convicted of an aggravated offense described in subsection(a)(1)(A); or

(iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2)

(7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders. As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from--

(A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial; and

(B) nonresident offenders who have crossed into another State in order to work or attend school.

(c) Registration of offender crossing State border. Any person who is required under this section to register in the State in which such person resides shall also register in any State in which the person is employed, carries on a vocation, or is a student.

(d) Penalty. A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(e) Release of information.

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

(f) Immunity for good faith conduct. Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall be immune from liability for good faith conduct under this section.

(g) Compliance.

(1) Compliance date. Each State shall have not more than 3 years from the date of enactment of this Act [enacted Sept. 13, 1994] in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds.

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3765).

(B) Reallocation of funds. Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(h) Fingerprints. Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 170102(h) [42 USCS § 14072(h)].

(i) Grants to States for costs of compliance.

(1) Program authorized.

(A) In general. The Director of the Bureau of Justice Assistance (in this subsection referred to as the "Director") shall carry out a program, which shall be known as the "Sex Offender Management Assistance Program" (in this subsection referred to as the "SOMA program"), under which the Director shall award a grant to each eligible State to offset costs directly associated with complying with this section.

(B) Uses of funds. Each grant awarded under this subsection shall be--

(i) distributed directly to the State for distribution to State and local entities; and

(ii) used for training, salaries, equipment, materials, and other costs directly associated with complying with this section.

(2) Eligibility.

(A) Application. To be eligible to receive a grant under this subsection, the chief executive of a State shall, on an annual basis, submit to the Director an application (in such form and containing such information as the Director may reasonably require) assuring that--

(i) the State complies with (or made a good faith effort to comply with) this section; and

(ii) where applicable, the State has penalties comparable to or greater than Federal penalties for crimes listed in this section, except that the Director may waive the requirement of this clause if a State demonstrates an overriding need for assistance under this subsection.

(B) Regulations.

(i) In general. Not later than 90 days after the date of enactment of this subsection [enacted Oct. 30, 1998], the Director shall promulgate regulations to implement this subsection (including the information that must be included and the requirements that the States must meet) in submitting the applications required under this subsection. In allocating funds under this subsection, the Director may consider the annual number of sex offenders registered in each eligible State's monitoring and notification programs.

(ii) Certain training programs. Prior to implementing this subsection, the Director shall study the feasibility of incorporating into the SOMA program the activities of any technical assistance or training program established as a result of section 40152 of this Act [42 USCS § 13941]. In a case in which incorporating such activities into the SOMA program will eliminate duplication of efforts or administrative costs, the Director shall take administrative actions, as allowable, and make recommendations to Congress to incorporate such activities into the SOMA program prior to implementing the SOMA program.

(3) Authorization of appropriations. There is authorized to be appropriated to carry out this subsection, $ 25,000,000 for each of fiscal years 1999 and 2000.

42 U.S.C. 3756 Allocation and distribution of funds under formula grants (a) Subject to subsection (f), of the total amount appropriated for this part [42 USCS §§ 3750 et seq.] in any fiscal year, the amount remaining after setting aside the amount required to be reserved to carry out section 511 of this title [42 USCS § 3761] shall be set aside for section 502 [42 USCS § 3752] and allocated to States as follows:

(1) $ 500,000 or 0.25 percent, whichever is greater, shall be allocated to each of the participating States; and

(2) of the total funds remaining after the allocation under paragraph (1), there shall be allocated to each State an amount which bears the same ratio to the amount of remaining funds described in this paragraph as the population of such State bears to the population of all the States.

(b)(1) Each State which receives funds under subsection (a) of this section in a fiscal year shall distribute among units of local government, or combinations of units of local government, in such State for the purposes specified in section 501(b) [42 USCS § 3751(b)] that portion of such funds which bears the same ratio to the aggregate amount of such funds as the amount of funds expended by all units of local government for criminal justice in the preceding fiscal year bears to the aggregate amount of funds expended by the State and all units of local government in such State for criminal justice in such preceding fiscal year.

(2) In distributing funds received under this part among urban, rural, and suburban units of local government and combinations thereof, the State shall give priority to those jurisdictions with the greatest need.

(3) Any funds not distributed to units of local government under paragraph (2) shall be available for expenditure by the State involved.

(4) For purposes of determining the distribution of funds under paragraphs (1) and (2), the most accurate and complete data available for the fiscal year involved shall be used. If data for such fiscal year are not available, then the most accurate and complete data available for the most recent fiscal year preceding such fiscal year shall be used.

(c) No funds allocated to a State under subsection (a) or received by a State for distribution under subsection (b) may be distributed by the Director or by the State involved for any program other than a program contained in an approved application.

(d) If the Director determines, on the basis of information available during any fiscal year, that a portion of the funds allocated to a State for that fiscal year will not be required or that a State will be unable to qualify or receive funds under section 502 [42 USCS § 3752], or that a State chooses not to participate in the program established under such section, then such portion shall be awarded by the Director to urban, rural, and suburban units of local government or combinations thereof within such State giving priority to those jurisdictions with greatest need.

(e) Any funds allocated under subsection (a) or (f) that are not distributed under this section shall be available for obligation under subpart 2 [42 USCS §§ 3760 et seq.].

(f) (1) For any fiscal year beginning more than 2 years after the effective date of this subsection--

(A) 90 percent of the funds allocated under subsection (a) without regard to this subsection to a State

described in paragraph (2) shall be distributed by the Director to such State; and

(B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).

(2) Paragraph (1)(A) refers to a State that does not have in effect, and does not enforce, in such fiscal year, a law that requires the State at the request of the victim of a sexual act--

(A) to administer, to the defendant convicted under State law of such sexual act, a test to detect in such defendant the presence of the etiologic agent for acquired immune deficiency syndrome;

(B) to disclose the results of such test to such defendant and to the victim of such sexual act; and

(C) to provide to the victim of such sexual act counseling regarding HIV disease, HIV testing, in accordance with applicable law, and referral for appropriate health care and support services.

(3) For purposes of this subsection--

(A) the term "convicted" includes adjudicated under juvenile proceedings; and

(B) the term "sexual act" has the meaning given such term in subparagraph (A) or (B) of section 2245(1) of title 18, United States Code.